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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. [redacted] 102

GEORGE FLINT, SAMUEL W. COLLINS and LUDWIG T. BREHM, doing business under the name of FLINT GOERING & CO., LTD., a limited partnership
Libellants Appellees

AGAINST

ROBINS DRY DOCK & REPAIR COMPANY
Respondent Appellant

MEMORANDUM FOR GEORGE FLINT ET AL. IN OPPOSITION TO PETITION FOR CERTIORARI

The petition does not disclose any sufficient grounds for granting certiorari.

The only novelty in this case is scarcely one of law, but is incidental to the high market value which time charters of steamers reached during the war period. The result of that circumstance was that time charterers of steamers under pre-war charters (as the libellants-appellees were) had heavy claims for deprivation of use, which under pre-war conditions would not have existed. So long as the value of use of a vessel to a time charterer did not greatly exceed the hire payable by him to the owner, claims for deprivation

of use were small, and there was much less temptation to contest them than where, as here, the loss to the charterer was substantial.

The decisions of the District Court and Circuit Court of Appeals are correct on the merits. They only gave libellants what the petitioner caused them to lose, which was the clearly ascertained and non-speculative value of their right of use of the vessel under their charter for two weeks, a contrary result would have been harshly unjust and could have been reached only by straining technical rules.

Negligence of the petitioner which caused the detention of the *Beresford* was expressly admitted in Article V of its answer to the libel (Rec. p. 7).

Before the petitioner severed from the owner the release of December 7, 1917, which it pleaded (Arts. XI-XII of Ans.) to defeat the libellants' claim the petitioner was fully advised of their claim by their letter of August 10, 1917 (Rec. p. 17). The consideration which the petitioner paid the owner for the release was the comparatively small amount of hire which the owner lost by the detention, that being only a small portion of the market value of use of the *Beresford* during the period of detention. The petitioner conceded below that the owner's representative when settling with the petitioner did not put forward or pretend to be settling the libellants' claim which was for such portion of the market value of use of the *Beresford* as exceeded the hire receivable by the owner, to which the libellants as time charterers were entitled for their own benefit.

The question before the lower courts therefore was whether the petitioner could take advantage of the charter situation to deprive the libellants of their share of the market value of use of the *Beresford*.

Reference to general decisions could not assist greatly in settlement of this question. The rights of the libellants under the time charter of July 13, 1913 (Rec. p. 25) were peculiar and not merely such as might exist under ordinary agreements for personal service. That charter gave the libellants exclusive use of the steamer for five years for carrying lawful merchandise according to their directions. By clause 8 they had the disposal of the whole reach of her holds, decks and usual places of loading and accommodation. By clause 9 the captain was under their orders and direction and the libellants by the same clause agreed to bear all liabilities arising from the captain signing or complying with bills of lading. By clause 11 they had permission to appoint a supercargo. By clause 19 they had a lien on the ship for all moneys paid in advance and not earned. By clause 1 the owner agreed to maintain the steamer in a thoroughly efficient state; and by clause 22 further agreed to dock the steamer whenever libellants as charterers and the master might think necessary, and at least once in every six months, and the steamer was put on petitioner's drydock solely for the purpose of complying with those obligations. They were being discharged by the petitioner as an independent contractor for the direct benefit of the libellants. The steamer was not in any sense withdrawn from the charter, but remained under it with payment of hire temporarily suspended.

Although the charter was not technically a demise, the libellants had qualified possession of the steamer, as evidenced by the use in clauses 1 and 5 of the expression "delivery" and "return delivery" (i. e. by owner to charterer and the reverse). Their relation to the vessel was such that they were the carriers of all cargoes which she might transport

See *The Centurion*, 37 Fed Rep 812; *Olsen v United States Shipping Co*, 213 Fed Rep 19. They had what Judge Hough aptly described in *The Santanna*, 152 Fed Rep 516, 518, as "an estate carved out of the ship". To put it another way, they had an interest rather like that of the lessee of real property.

The decisions of the courts below do not stand by themselves. The same result had been previously reached by Judge Mayer after full consideration in *The Iquitenia*, 270 Fed Rep 239, which involved a much larger sum and which held the time charterer of the *Lord Dufferin* entitled to recover its loss, value of the use of that steamer, resulting from her running down in New York harbor by the *Iquitenia*. The Circuit Court of Appeals for the Ninth Circuit followed the same principle in *The Bonner*, 279 Fed Rep 134. An analogous decision was made by the Circuit Court of Appeals for the Seventh Circuit in *Great Lakes etc. Transportation Co v Scranton Coal Co*, 229 Fed Rep 601, where the Court affirmed an order of the District Court which restrained the owner from selling steamers which it had chartered. The Court intimated that specific performance of the charters might be granted.

So far back as 1882 Judge Addison Brown held in *The General Republic*, 10 Fed Rep 795, that the mortgagee of a vessel having neither ownership nor possession was entitled to sue for collision damages. See also *Hines v Mansfield & A Co*, 206 Fed Rep 502; *The Vreland*, 1927 A M C 1141. These several decisions as well as that in the case at bar are all in accord with the principle laid down by this Court that in admiralty cases the real party in interest should institute suit in his own name. *Peet v Roth*, 12 How 468, 469. The petitioner did not assign error to the point

that the owner of the *Bjornefjord* was not made a party libellant, and any such objection now is out of order. *The Commander in Chief*, 1 Wall. 43, 52-53.

Recovery for loss of use of chattels is sustained by all the authorities with scarcely any dissent. See Harvard Law Review for April, 1926, at page 760. The English case of *The Susquehanna*, which the petitioner cites, is not in conflict because there it was established that the ship would not have been chartered. Here the *Bjornefjord* was already under a charter and her market value for the period of loss of use was definitely ascertained.

The objection to jurisdiction made by the petitioner is without merit. This Court denied certiorari (242 U. S. 636) in *The Anglo Patagonian*, 235 Fed. Rep. 92, where the accident happened in a dry dock at Newport News of the same type as that here involved. The petitioner's answer to the libel expressly admitted the jurisdiction (Art. VI, Rec. p. 7).

The petition should be denied.

Respectfully submitted,

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Roscoe H. Hupper
William J. Dean
Counsel for George Flint, *et al*
Libellants-Appellees

September, 1926.